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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

October 13, 1995

OUR FILE NO.
0258-100-63

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

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Re: Reply Comments of Noble Broadcast Group, Inc.
IB Docket No. 95-91
GEN Docket No. 90-357
RM No. 8610

Dear Mr. Caton:

Transmitted herewith on behalf of Noble Broadcast Group, Inc., are an original and nine copies of its Reply Comments in response to the Notice of Proposed Rulemaking issued in the above-captioned proceeding.

If there are any questions concerning this submission, please contact this office directly.

Sincerely,


John M. Pelkey

JMP/ned

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OCT 13 1995

Before The
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter Of)	IB Docket No. 95-91
)	GEN Docket No. 90-357
Establishment of Rules and Policies)	RM No. 8610
for the Digital Audio Radio Satellite)	PP-24
Service in the 2310-2360 MHz)	PP-86
Frequency Band)	PP-87

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To: The Commission

**REPLY COMMENTS OF
NOBLE BROADCAST GROUP, INC.**

Noble Broadcast Group, Inc. ("Noble"), through counsel, hereby submits its Reply Comments in the above-captioned proceeding.

In its Comments, Noble explained to the Commission that DARS would have an adverse effect on the continued viability of local broadcasters. Noble pointed in particular to the unfortunate effects that were caused by the Commission's Docket 80-90 rulemaking proceeding, which flooded the nation with additional terrestrial broadcast stations and which, contrary to the Commission's expectations, did not lead to an increase in the availability of "niche" programming. In fact, the addition of the Docket 80-90 stations forced stations to reduce the amount of local programming they aired inasmuch as the decreased revenues brought about as a result of the increased competition necessitated cost-cutting measures. Noble urged the Commission to learn from the mistakes of the past and to formulate rules that would help to ensure the continued viability of the local broadcast service that has formed an integral part of community life in this country for nearly three quarters of a century.

Despite their length, the comments of the proposed DARS providers can be summarized in a single demand; "believe us, the terrestrial

broadcasters won't be hurt, give us everything you have, and don't impose any regulation on us." Even though the comments filed by the prospective DARS providers are lengthy, they provide no justification for the Commission's acquiescence to this demand.

I. DARS will Have a Direct, Adverse Effect on the Public as Broadcasters are Forced to Decrease their Local Programming

As it establishes the ground rules for DARS, the Commission must focus on the undisputed fact that the DARS applicants propose no local service. This means that, if such service is to continue, the burden of providing such service will fall upon the terrestrial broadcasters. As is cogently explained in the Comments of the National Association of Broadcasters, however, DARS carries with it the potential to be the "last straw" that brings about the demise of localism in broadcasting.¹ The siphoning of audience and revenue from terrestrial broadcasters inevitably will force broadcasters to decrease expenses by decreasing personnel costs and increasingly relying on satellite-fed programming. Of particular note is the fact that current providers of localized "niche" programming may be forced to forego such programming in order to compete with DARS² -- thus leading to the irony that the service supposedly designed to encourage "niche" programming will lead to a decrease in such programming. Thus, the real issue in this proceeding is not, as the DARS proponents would have the Commission believe, the private interests of broadcasters, but the public

¹ Comments of the National Association of Broadcasters (hereinafter "NAB Comments") at 21 - 39.

² NAB Comments at 31 - 32.

interest in the continued provision of local programming (whether of a general or “niche” nature). It is against this background that the rules in implementation of DARS service must be judged.

II. The DARS Providers Significantly Understate the Effect of DARS on Terrestrial Broadcasters

In its Comments, the National Association of Broadcasters conclusively demonstrated the severe effect that the Docket 80-90 proceeding had upon terrestrial broadcasters.³ By contrast, the DARS applicants have done little more than to engage in speculation as to the possible effect of DARS service upon terrestrial broadcasting. Their studies are uniformly characterized by an assumption that DARS will not be very successful in its initial years. Basing their studies upon this assumption, the DARS proponents claim that the effect upon broadcasters will be minimal. Thus, CD Radio, Inc., presents a study asserting that satellite radio will not penetrate the automobile market by more than 3 to 10 percent by 2004.⁴ Left unmentioned by CD Radio, Inc., however, is the fact that the industry’s own consultants predict substantial growth in DARS penetration thereafter. For example, in their study of the potential effect of DARS upon terrestrial broadcasting, Primosphere Limited Partnership and American Mobile Radio Corporation acknowledge that, assuming the commencement of DARS service in 2000, “penetration growth is forecast to be relatively slow for the first four years,

³ NAB Comments at 28 & Att.9, “The Economic Impact of Satellite-Delivered Radio on Local Radio Stations,” prepared by Kagan Media Appraisals, Inc.

⁴ Comments of CD Radio, Inc., at App.A, “Lilley Study” at 5.

with *rapid growth in penetration thereafter*" (emphasis added).⁵ It is thus evident that the DARS applicants' studies artificially deflate the predicted impact of DARS service upon terrestrial broadcasting by making unsupported and contradictory assumptions concerning the success of their own service.⁶

In contrast to the DARS applicants' studies, which are all based upon assumptions uniquely skewed to downplay the importance of DARS, the NAB demonstrated that, in the real world case involving the addition of stations brought about through the Docket No. 80-90 proceeding, the effect upon broadcasting was significant.⁷ Moreover, the NAB Comments effectively counter the assumption made by the DARS applicants that small decreases in advertising revenue will not have a significant effect upon the viability of terrestrial broadcasters. There can be no question but that DARS will have a significant effect upon terrestrial broadcasting and it thus becomes incumbent upon the Commission to establish rules that will help to ensure the continued viability of localism in broadcasting.

⁵ Comments of American Mobile Radio Corporation at App.A, "Satellite DARS Impact Study," prepared by Malarkey - Taylor Associates, Inc. - EMCI at 2.

⁶ Similarly, the DARS applicants paint an artificially optimistic view of the success of terrestrial broadcasting. CD Radio, Inc., for example, implies that small market radio will not be affected by DARS because revenues for small market radio stations have risen over the years. Unacknowledged by CD Radio, Inc., is the fact that its own study recognizes revenues for small market radio stations rose only 22% in the six years between 1987 and 1993, i.e., only 3.6% on an uncompounded basis.

⁷ See NAB Comments at Att.9, 18-21.

III. DARS Must Be Offered On A Subscription Basis Only

Although the Commission was under the impression that three of the four DARS applicants proposed to operate as subscription services, one of those three states in its Comments⁸ that it also proposes to use advertiser-supported channels and the remaining two argue that the Commission should not require that DARS be a subscription service.⁹ If the adverse effect of DARS on terrestrial broadcasters is to be minimized, however, it is essential that DARS be provided only as a subscription service. DARS presents a potential double-barreled assault on terrestrial broadcasters. First, it threatens to draw listeners from terrestrial broadcasters with the result that advertising revenues, which are based on a station's ability to reach potential customers, will decline as the size of the audience declines. Second, if DARS is also able to be offered on an advertiser-supported basis, it further weakens terrestrial broadcasters by decreasing the advertiser dollars available for terrestrial broadcasters. Only by requiring DARS providers to offer service on a subscription-only basis will the Commission be able to reduce the potentially catastrophic effects of DARS on local broadcasting.

IV. The Commission Should Permit Additional Parties to File DARS Applications

The DARS providers insist that they have a right to all of the DARS spectrum because they filed applications that have been cut off. At the time the DARS applicants filed their applications, however, no spectrum

⁸ Comments of American Mobile Radio Corporation at 21.

⁹ Comments of CD Radio, Inc., at 78-85. Comments of Digital Satellite Broadcasting Corporation at 52.

whatsoever had been allocated for DARS service. As a result, the DARS applicants had no right to expect that their applications would be granted, much less that the entire 50 MHz that has now been allocated would be made available solely to them. In fact, it would be directly contrary to the public interest to award all 50 MHz of DARS spectrum to the remaining DARS applicants. As is evidenced by the NAB Comments,¹⁰ the programming proposed by the DARS applicants is not particularly unique and does not serve any special need. Given the reluctance of the DARS applicants to subject themselves to public interest obligations, it stands to reason that the Commission should permit additional parties, especially terrestrial broadcasters, to file applications for DARS given the extensive experience that terrestrial broadcasters have with providing programming that serves the public interest.

V. The DARS Providers Must Share in the Public Interest Obligations Imposed Upon Broadcasters

The DARS providers and the proponents of DARS service all advocate its early implementation because of the claim that the service will provide “niche” programming. Despite this claim, the DARS providers demonstrate a uniform abhorrence of any regulation that would require them to fulfill the promises that, in the eyes of the prospective DARS providers, entitle them to unfettered oligopolistic control over DARS service. Just as terrestrial broadcasters are obligated to determine the problems, needs and interests of their service areas and to provide programming to meet those problems, needs and interests, so too should DARS providers, who have allegedly

¹⁰ NAB Comments at 40-44.

determined that there is a need for “niche” programming, be required to demonstrate that they are providing such “niche” programming.¹¹

In addition, given the importance that the Commission places upon the fact that DARS would have the potential for providing programming to minorities, it is essential that the Commission impose upon DARS providers the same EEO obligations that it imposes upon terrestrial broadcasters. Similar obligations are placed upon cable systems¹² and, despite the protests of the DARS providers that they intend “to hire the most qualified and diverse group of personnel without respect to race, religion, national origin or sex”¹³, there is no reason to insulate DARS providers from these obligations that must be borne by other programming providers.

Similarly, if as is suggested by the DARS providers, they are not to be required to provide service on a subscription-only service, the Commission must impose the same political obligations on DARS providers as are imposed on terrestrial broadcasters. In fact, given the nationwide coverage

¹¹ The need to ensure that the satellite providers follow through on their promises is demonstrated by the Comments filed in this proceeding. Included with the Comments of CD Radio, Inc., is a study that seeks to take the terrestrial radio industry to task because that study could find evidence of only two Japanese radio stations, five Greek radio stations, one Jewish radio station and six Polka radio stations. Comments of CD Radio, Inc., App.A at 24-27. The study claims that DARS could offer a channel devoted to each of these “formats.” Curiously, however, the registration statement filed by CD Radio, Inc., with the Securities and Exchange Commission includes a chart setting forth CD Radio’s proposed “narrowcast” programming. Significantly, the chart includes no Japanese channel, no Greek channel, no Jewish channel, no Chinese channel and even no Polka channel. See NAB Comments, Att.10.

¹² See 47 C.F.R. § 76.71 *et seq.*

¹³ Comments of CD Radio, Inc. at 85. These intentions are shared by the vast majority of terrestrial broadcasters, but do not exempt them from complying with the Commission’s EEO requirements.

that can be achieved by the DARS providers, there is even more reason to impose such an obligation upon them.

VI. DARS Providers Should Not Be Permitted To Use “Gap-Fillers”

If the Commission is to avoid turning DARS into a charade, it must resist the pleas of the DARS providers to permit the use of terrestrial gap-fillers. These gap-fillers are no more than terrestrial DAB systems. DARS has been created as a separate service because of the fact that it proposes to use satellite technology for the delivery of programming. To the extent that DARS providers must insist upon the ability to use terrestrial gap-fillers, it is an indication that the purported advantages of DARS technology are a myth. In this regard, it should be noted that the comments of Ford Motor Company indicate the DARS applicants may have underestimated the possibilities for shadowing -- with the inevitable result that they will increase their demands to be able to use terrestrial gap-fillers. While Noble strenuously objects to the use of terrestrial gap-fillers by DARS providers, it would urge the Commission, in the event the Commission decides to authorize the use of such gap-fillers, to (1) withhold authorization for any terrestrial gap-fillers until such time as a true terrestrial DAB system is in place and (2) require that any terrestrial gap-fillers be used purely to rebroadcast satellite signals.

Conclusion

As has been demonstrated in Noble's initial comments, as well as the Comments of the National Association of Broadcasters, DARS will, despite the claims to the contrary, have a significant and deleterious effect upon

local, terrestrial broadcasting. Accordingly, the Commission must take the steps outlined in Noble's Comments and those of the NAB to minimize those effects.

Respectfully submitted,

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By 
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October 13, 1995